No. 91-962

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CYNTHIA HARRIS,

Appellant,

v.

THE CITY OF BIRMINGHAM, *ET AL.*,

Appellees.

On Appeal from the United States District Court for the Northern District of Alabama

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JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

1. Under section 5 of the Voting Rights Act of 1965 as amended, is preclearance required for an enactment that:

(a) requires the holding of a referendum;

(b) limits the voters who can vote in a newly required referendum to residents of only a portion of a city that lies within two counties;

(c) prohibits local jurisdictions from conducting such a referendum in tandem with any mayoral or councilmanic election; and

(d) prescribes the language to be placed on the ballot with respect to such a referendum?

2. Under section 5 of the Voting Rights Act of 1965 as amended, must preclearance be sought when a local jurisdiction exercises its discretion to select and set the date for a special referendum?

PARTIES

The following were parties in the courts below:

The Greene County (Ala.) Racing Commission

The Greene County Board of Education

The Greene County Commission; and

Cynthia Harris, a black registered voter and resident of Birmingham and of Jefferson County, Alabama,

Plaintiffs;

The City of Birmingham, Alabama

The Jefferson County, Alabama, County Commission

The Birmingham Racing Commission

Birmingham Sports Management; and

Milton McGregor,

Defendants.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion and order of the three-judge district court is contained in the Appendix to this Jurisdictional Statement [hereafter "J.S. App."], at pages A-2 to A-23; it is not reported. The opinion and order of the three-judge district court denying the motion for reconsideration is also unpublished. It appears at J.S. App. A-24 to A-28.

JURISDICTION

The district court entered judgment against appellant on August 26, 1991, J.S. App. at A-23, and denied the motion to reconsider on September 19, 1991, J.S. App. at A-28. The Notice of Appeal was filed on October 17, 1991. J.S. App. at A-41. This Court has jurisdiction under 28 U.S.C. § 1253.

STATUTORY PROVISIONS INVOLVED

This case involves section 5 of the Voting Rights Act of 1965 as amended, 42 U.S.C. § 1973c, which is reprinted in the Appendix, at pages A-29 to A-31. It also involves Code of Ala. §§ 11-65-1(14), 11-65-2(a)(18), and 11-65-4(b), (c), and (d), as amended by Alabama Act 91-187 (July 28, 1991). Those provisions are set out in the Appendix, at pages A-31 to A-37. Finally, it involves Resolution 1257-91 of the Birmingham City Council. That resolution is reprinted in the Appendix at pages A-37 to A-40.

STATEMENT OF THE CASE

Except to the extent that it is authorized by statute, pari-mutual betting on horse and greyhound racing is prohibited by the Alabama Criminal Code. J.S. App. at A-5. In 1984, the Alabama Legislature enacted Act No. 84-131, which permitted a Class 1 municipality[1] to permit pari-mutual betting on horse racing if a majority of the

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[1] Birmingham is the only Class 1 municipality in Alabama. *See* J.S. App. at A-8 n. 8.

residents of the municipality and of the county in which the municipality is located[2] approved such a proposal through a referendum.

At an election conducted on June 12, 1984, majorities of the voters in Birmingham and in Jefferson County (where the entire city of Birmingham was then located) approved a referendum providing for pari-mutual horse racing in the city. J.S. App. at A-6 to A-7. Accordingly, Birmingham established a Racing Commission and issued a license for a horse-racing facility. *Id.* at A-7.

The track proved to be an economic failure, losing over $20 million and plunging its owners and operators into bankruptcy. *Id.*

In 1991, the Alabama Legislature enacted Act No. 91-187 (codified at Code of Ala. §§ 11-65-1 to 11-65-47 (Michie 1991 Supp.)) [hereafter referred to as the "Dog Racing Act"]. The Act became law on July 28, 1991, without the signature of the governor. J.S. App. at A-8 n. 7.

As the district court noted, the Dog Racing Act "substantially amended Act No. 84-131, *inter alia*, to authorize greyhound racing and pari-mutual betting thereon in the City of Birmingham." J.S. App. at A-8.

Of particular salience to this appeal, the Dog Racing Act:

- required Birmingham to call for an election prior to

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[2] At the time Act 84-131 was passed, the City of Birmingham was contained entirely within Jefferson County. *See* Code of Ala. § 11-65-1(3) (Michie Supp. 1991). Subsequently, however, Birmingham annexed territory lying within Shelby County. For purposes of Act 84-131, however, Birmingham was defined as being located entirely within Jefferson County.

January 1, 1992, to determine whether to authorize greyhound racing and pari-mutual betting on greyhound racing[3]

- limited the franchise to those Birmingham voters who were also Jefferson County residents (thereby excluding city voters who lived in the Shelby County portion of the city[4]

- prohibited Birmingham from conducting the greyhound racing referendum at the same time that it held its election for mayor or for two or more city council members[5]

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[3] Dog Racing Act, § 4(b), Code of Ala. § 11-65-4(b) (Michie Supp. 1991); *see* J.S. App. at A-9.

[4] Dog Racing Act, § 4(b), Code of Ala. § 11-65-4(b), (Michie 1991 Supp.), provides that the required election "shall be held only among the qualified voters of the host county, and no voters of the sponsoring municipality who reside in counties other than the host county shall be permitted to vote in such election." (For passage, an affirmative vote is required both among county voters as a whole and among county voters who are residents of the sponsoring municipality.) *See also* J.S. App. at A-32 to A-33 (reprinting section 4(b)). Section 2(a)(18) of the Dog Racing Act, Code of Ala. § 11-65-2(a)(18), defines the host county as "the county in which a majority of the residents of the sponsoring municipality reside, as determined by the most recent federal decennial census." *See also* J.S. App. at A-31 (reprinting section 2(a)(18)). In the case of Birmingham, this is Jefferson, rather than Shelby, County. *See* J.S. App. at A-9.

[5] Dog Racing Act § 4(c), Code of Ala. § 11-65-4(c) (Michie 1991 Supp.) (reprinted in J.S. App. at A-35); *see* J.S. App. at A-9. Thus, although Birmingham was scheduled to have its regular mayoral election in the fall of 1991, it was prohibited from conducting the greyhound racing referendum at the same time. Testimony at the preliminary injunction hearing suggested that the separation of the greyhound referendum from the mayoral election was at least in part

As a result of the passage of the Dog Racing Act, the Birmingham City Council adopted Resolution No. 1257-91 requesting the Jefferson County Commission to call a special election throughout the county on August 27, 1991 -- less than a month after the effective date of the Dog Racing Act -- "for the purpose of determining whether or not greyhound racing and pari-mutual wagering thereon shall be permitted in the part of the City located within the county." J.S. App. at A-39; *see* J.S. App. at A-9. The Jefferson County Commission then set the election for the requested date; the only other measure on the ballot concerned the renewal of certain *ad valorem* taxes. *Id.* at A-10.

Neither the State of Alabama nor the City of Birmingham nor the Jefferson County Commission -- each of which is a "covered jurisdiction" within the meaning of section 5 of the Voting Rights Act of 1965, *see* 28 C.F.R. Part 51, Appendix (1991) (entire state of Alabama is covered) -- sought preclearance pursuant to section 5 of any of the provisions of the Dog Racing Act or the local enabling measures.

Less than three weeks after the Dog Racing Act became law, appellant Cynthia Harris, a black resident of the Jefferson County portion of Birmingham and a registered voter -- along with a number of other plaintiffs whom the district court dismissed for lack of standing, *see* J.S. App. at A-16 to A-17 -- sought, in the United States District Court for the Northern District of Alabama, to enjoin the scheduled referendum for failure to receive preclearance. Pursuant to 42 U.S.C. § 1973c and 28 U.S.C. § 2284, a three-judge district court consisting of Circuit Judge Dubina, and District Judges Propst and

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a tactical response to the fact that many black ministers opposed the authorization of pari-mutual wagering but supported the reelection of the incumbent black mayor, who supported racing. *See* Transcript of Preliminary Injunction Hearing at 32.

Nelson was designated to hear this case.

In her brief and at the hearing before the three-judge court, appellant claimed that six separate aspects of the Dog Racing Act and its local enabling legislation involved changes in "voting qualification[s] or prerequisite[s] to voting, or standard[s], practice[s], or procedure[s] with respect to voting," 42 U.S.C. § 1973c, and therefore required preclearance:

> (1) the limitation of the vote to Jefferson County residents of Birmingham and the exclusion of the city's Shelby County voters;
>
> (2) the newly enacted requirement to hold an election to consider greyhound racing;
>
> (3) the scheduling of the special election for August 27, 1991;
>
> (4) the prohibition on conducting the referendum in tandem with any mayoral or councilmanic election;
>
> (5) the failure to provide notice regarding the Act to voters in Shelby County; and
>
> (6) the actual language of the referendum question.

See J.S. App. at A-15 to A-16.

At the end of the hearing on August 22, 1991, the three-judge court dismissed all of appellant's section 5 claims. *See* J.S. App. at A-4 n.3. In its opinion, filed four days later, the district court expressly acknowledged that each of the challenged provisions was a "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting," within the meaning of section 5. *See* J.S. App. at A-18. But it held that appellant had failed to provide credible evidence of

their "potential for discrimination." *Id.* at A-18 to A-19.

With regard to appellant's claim regarding the scope of the franchise, the court made the somewhat paradoxical "observation" that since Shelby County residents could not have voted in the 1984 *horse-racing* referendum, permitting Shelby County residents of Birmingham[6] to vote in the newly authorized 1991 *greyhound-racing* referendum would itself require preclearance. J.S. App. at A-19. Moreover, the court held, because the Shelby County portion of Birmingham is more than 98% white, its exclusion "could not possibly discriminate against blacks in Birmingham and Jefferson County." *Id.*

With regard to appellant's claims regarding the setting of the referendum, the three-judge court noted that the Attorney General's regulations required preclearance, *see* 28 C.F.R. § 51.17 (1991), but held that "[t]he plaintiffs have produced no evidence" of a potential for discrimination in the "mere" decision to conduct a referendum. J.S. App. at A-21. As to the actual date chosen, the court disposed of appellant's argument that the actual date chosen and the prohibition on holding the referendum in tandem with the mayoral and councilmanic elections would depress black turnout because it found that plaintiffs had "presented no firm credible evidence," while the defendants had presented testimony from a "leading black politician" who disputed the claim. *Id.* at A-22.

Finally, with regard to the actual form of the ballot question, the three-judge court again found preclearance not to be required because plaintiffs "have not presented

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[6] There were no such persons in 1984, since Birmingham's annexation of property located in Shelby County did not occur until *after* the 1984 horse-racing referendum. *See* Code of Ala. § 11-65-1(3) (Michie 1991 Supp.).

any evidence from which the court could conclude that this change has any potential for discrimination on the basis of race or color." *Id.* at A-23.

In light of the three-judge court's opinion and order, the referendum went forward on August 27, 1991. The proposal was defeated. Pursuant to section 4(d) of the Dog Racing Act, Code of Ala. § 11-65-4(d), however, "[o]ne or more subsequent elections may be requested ... if the question submitted at the preceding election ... [did] not receive the required majority of votes cast ...."[7]

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Section 5 of the Voting Rights Act of 1965 as amended prohibits covered jurisdictions such as Alabama and political subdivisions within Alabama from "enact[ing]

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[7] Because appellant challenged the underlying legislation -- the Dog Racing Act -- governing the conduct of greyhound-racing referenda in Birmingham, as well as the actual conduct of the August 27 election, her section 5 lawsuit was not rendered moot by the defeat of the referendum proposal. Thus, with the exception of appellant's challenge to the setting of the date of August 27, 1991, for the referendum, this case is very different from *Watkins v. Mabus,* 60 U.S.L.W. 3358 (Nov. 12, 1991) (No. 91-434), in which this Court dismissed, on *Munsingwear* grounds, Watkins' claim that section 5 required preclearance of absentee ballot procedures adopted for an election that had already been completed. In this case, by contrast, the procedures authorizing greyhound-racing referenda in Birmingham, restricting the scope of the franchise, setting out the form of the questions to be presented, and prohibiting such referenda to be conducted in tandem with mayoral or councilmanic elections remain on the books to govern future elections. In a sense, then, appellant's complaint is in no different position than it would have been had the Alabama Legislature not required the election to occur until 1992, and had appellant merely challenged the refusal to seek preclearance.

or seek[ing] to administer *any* voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964," 42 U.S.C. § 1973c (emphasis added), without first receiving preclearance of any change either from the United States District Court for the District of Columbia or the Attorney General.

Three aspects of section 5 are especially salient to this appeal. *First,* section 5 requires preclearance of "*any* State enactment which alter[s] the election laws of a covered State in even a minor way." *Allen v. State Board of Elections,* 393 U.S. 544, 566 (1969).

Second, section 5 permits local district courts only a strictly limited role: they are to decide whether a change must be submitted for preclearance (the so-called "coverage" question); they may not, however, decide whether a change actually has a discriminatory purpose or effect. The latter determination is reserved exclusively for the United States District Court for the District of Columbia or the Attorney General. *See, e.g., Conner v. Waller,* 421 U.S. 656, 656 (1975) (per curiam); *Perkins v. Matthews,* 400 U.S. 379, 384-86 (1971); *Allen v. State Board of Elections,* 393 U.S. at 561.

Third, section 5 places the burden on covered jurisdictions to prove that election-law changes do not have the purpose and will not have the effect of denying or abridging minority voters' right to vote; it does not place any burden regarding the purpose or effect of changes on affected voters. *See, e.g., McCain v. Lybrand*, 465 U.S. 236, 247 (1984); *United States v. Board of Commissioners*, 435 U.S. 110, 121 (1978); *Georgia v. United States*, 411 U.S. 526, 538 (1973).

In this case, the three-judge court flouted each of these well-established principles. Moreover, in reaching its clearly erroneous result, it also ignored the long-standing

administrative regulations of the Department of Justice which this Court has repeatedly held to be entitled to great deference. *See, e.g., NAACP v. Hampton County*, 470 U.S. 166, 178-79 (1985); *Dougherty County Board of Education v. White*, 439 U.S. 32, 39 (1978); *United States v. Board of Commissioners*, 438 U.S. at 131. Because the approach taken by the district court dramatically reinterprets the scope and operation of section 5, this case presents several substantial federal questions.

I. THE COURT BELOW CRITICALLY MISINTERPRETED THE SCOPE OF SECTION 5'S COVERAGE

As this Court has noted, section 5 was intended to reach *all* changes in voting qualifications, prerequisites to voting, or standards, practices, or procedures with respect to voting. *See, e.g., Dougherty County Board of Education*, 439 U.S. at 39; *Perkins v. Matthews*, 400 U.S. at 387-89; *Allen*, 393 U.S. at 568.

It cannot seriously be disputed that each of the provisions of the Dog Racing Act challenged in this lawsuit falls within the scope of section 5. Indeed, the district court acknowledged as much. *See* J.S. App. at A-18.

• The Dog Racing Act's limitation of the franchise in any election regarding greyhound racing within the City of Birmingham to only those city residents who were *also* residents of Jefferson County, thereby denying residents of the Shelby County portion of the city any vote in the referendum, obviously involves a "voting qualification." *See also, e.g., Dotson v. City of Indianola*, 521 F. Supp. 934, 943 (N.D. Miss. 1981) (three-judge court) (city's attempt not to permit residents of pre-cleared annexations to vote in an election constituted a "de-annexation" requiring preclearance under § 5), *aff'd*, 456 U.S. 1002 (1982); 28 C.F.R. §§ 51.13(a) (1991) (including among changes that

must be precleared "[a]ny change in qualifications or eligibility for voting"), 51.13(e) (1991) (including among changes requiring preclearance "[a]ny change in ... the boundaries of a voting unit (e.g., through ... annexation [or] deannexation")). Just as clearly, since there was *no* definition of the qualifications necessary to vote in Class 1 municipality greyhound-racing referenda prior to the passage of the Dog Racing Act, the definition of such qualifications is necessarily a "change" from the practices in effect on November 1, 1964.

• The decisions surrounding the setting of the date for the greyhound-racing referendum -- both those within the Dog Racing Act and those involving the choice among available dates by the Birmingham City Council and the Jefferson County Commission -- also undeniably involved voting "standard[s], practice[s], or procedure[s]" within the meaning of section 5. *See, e.g., Lucas v. Townsend,* 108 S. Ct. 1763, 1765 (1988) (Kennedy, J., in chambers) (enjoining bond election when date had not been precleared); *NAACP v. Hampton County,* 470 U.S. at 178 ("a change in the date of an election, if effected by statute, requires approval by the Attorney General under § 5"); *Garcia v. Guerra,* 744 F.2d 1159, 1164-65 (5th Cir. 1984) (explaining why new election schedules are covered by section 5), *cert. denied,* 471 U.S. 1065 (1985); *Busbee v. Smith,* 549 F. Supp. 494, 520 (D.D.C. 1982) (three-judge court) (conducting an election on dates other than those provided for in a pre-existing statute, is covered by section 5), *aff'd,* 459 U.S. 1166 (1983); 28 C.F.R. §§ 51.13(j) (1991) ("[a]ny change affecting the necessity of or methods for offering issues and propositions for approval by referendum"), 51.17(b) (1991) ("[a]ny discretionary setting of the date for a special election [described in § 51.17(a) as including "an initiative, referendum, or recall election"] ... is subject to the preclearance requirement"). Here, too, of course, the decision by the Alabama Legislature to require a referendum election, to outline the precise form that election should take, and to prohibit its being held

concurrently with other elections marked a "change" from pre-existing practice, since no election on this subject -- at any time involving any format -- was authorized prior to the passage of the Dog Racing Act. The same analysis applies to the decision by Birmingham and Jefferson County to set an election for August 27, 1991, when no election on that date had previously been authorized.

Under this Court's well-established analysis, the recognition by the district court that this case involved a section 5 challenge to as-yet unprecleared changes in voting qualifications and procedures should have ended its inquiry and led it to issue the requested injunction. *See, e.g., NAACP v. Hampton County*, 470 U.S. at 181; *McCain v. Lybrand*, 465 U.S. at 250 n. 17; *United States v. Warren County*, 429 U.S. 642, 644 n. 1 (1977); *Allen*, 393 U.S. at 558-59.

Instead, the district court totally misread this Court's analysis to hold that "[w]hether a specific change made by a covered political jurisdiction constitutes a change in a 'voting qualification or prerequisite to voting, or standard, or practice, or procedure with respect to voting' that is subject to the preclearance requirement of Section 5 turns on whether such a change has the 'potential for discrimination' against black persons," J.S. App. at A-12, in light of the facts presented by the plaintiffs in the case before it. In other words, the district court decided to consider whether *it* was convinced that "discrimination is a plausible consequence" of the challenged changes. *Id.* at A-10 and A-14 (internal quotation marks omitted).

That inquiry completely misses the mark. While this Court has explained section 5 coverage by pointing to the potential discriminatory consequences of the *type* of change at issue in various section 5 cases, it has *never* required plaintiffs to show that discrimination was in fact a "plausible" explanation for the changes. To the contrary, once it is clear that a challenged change falls into the

category of changes affecting voting, preclearance is required. Requiring plaintiffs in section 5 coverage cases to present facts regarding electoral circumstances in specific jurisdictions not only improperly relocates the burden of proof, *see infra* Part II, but also asks the local district court to do precisely what was forbidden by Congress -- that is, to determine whether a change was actually discriminatory. *See, e.g., Conner v. Waller,* 421 U.S. at 656.

In short, the "potential for discrimination" inquiry is a way of determining, with regard to a previously unaddressed type of statute, whether the change is a change "with respect to voting" (as opposed to a change affecting only things other than voting). It is *not* an additional hurdle that plaintiffs in section 5 coverage cases must surmount once they have shown that the change involved is a "voting" change.

The proposition that once it is clear a change involves voting its purpose and effect are irrelevant to the question of section 5 coverage was established as long ago as *Allen*. One of the provisions at issue in that case was a bulletin promulgated by the Virginia Board of Elections providing expanded assistance for voters who were otherwise unable to cast ballots because of illiteracy. This Court squarely held that the bulletin required preclearance, without inquiring at all into the purpose or impact of the new voter-assistance procedures:

> As in all these cases, we do not consider whether this change has a discriminatory purpose or effect. It is clear, however, that the new procedure with respect to voting is different from the procedure in effect when the State became subject to the Act; therefore, the enactment must meet the approval requirements of § 5 in order to be enforceable.

Allen, 393 U.S. at 570. Thus, the *Allen* Court utterly refused to ask whether it was "plausible" to believe that increased voter assistance had the purpose or effect of impairing the voting rights of Virginia's black citizens. Since the bulletin clearly *changed* those rights, preclearance was required. Similarly, in *NAACP v. Hampton County*, the Court did not decide that the change in the particular election date at issue in that case had to be precleared because that particular change was plausibly discriminatory. Rather, the Court simply delineated the reasons why changes in election dates *might, under certain circumstances*, be discriminatory. *See* 470 U.S. at 178. Having reached that conclusion, it held that preclearance was required in the case before it. As the Court explained:

> Pursuant to [the regulations in 28 C.F.R. Part 51], the Attorney General has, since 1980, reviewed approximately 58 changes in election dates .... *In none of these instances did the Attorney General advise the covered jurisdiction that its submission was not a "change"* and on several occasions objections were interposed.

NAACP v. Hampton County, 478 U.S. at 178-79 (emphasis added). In short, this Court's coverage decisions have been "categorical," that is, intended to govern *all* cases involving similar changes, regardless of the precise factual circumstances in the covered jurisdictions. *See also, e.g., Georgia v. United States,* 411 U.S. at 533 (noting, in a reapportionment case from Georgia "the decisiveness with which *Allen* [an earlier case involving claims of vote dilution in Mississippi] controls this case"). And every year, the Attorney General examines, and preclears, literally hundreds of voting changes that are clearly ameliorative -- such as expanding registration opportunities or polling hours.

Thus, the decision below announced a novel and

insupportable substantive test in section 5 coverage cases. Its analysis is so contrary to precedent and devoid of merit that summary reversal might well be appropriate.

Not only is this new substantive test completely unjustifiable, it also threatens a fundamental, and destructive, sea-change in the entire section 5 preclearance scheme, including this Court's role. As this Court recognized last Term in *Clark v. Roemer,* 111 S. Ct. 2096, 2104 (1991), jurisdictions have a responsibility "for self-monitoring under § 5," which places the duty on them to seek preclearance. Under the district court's approach in this case, that self-monitoring responsibility is gone: rather than being obligated to respect Congress' intention that "all changes, no matter how small, be subjected to § 5 scrutiny," *Allen*, 393 U.S. at 568, a jurisdiction is now presented with an incentive "to forgo the preclearance process altogether," *Clark*, 111 S. Ct. at 2104, whenever *it* concludes that its changes are not discriminatory.

Previously, it would have been clear to any moderately well-informed state or local government legal official that reapportionments, annexations, changes in voting procedures, restrictions on candidacy, or changes in the date of elections required preclearance. Thus, law-abiding jurisdictions would simply have submitted such changes to the Attorney General (or, in a few cases, would have sought a declaratory judgment from the United States District Court for the District of Columbia). The Attorney General's enforcement responsibilities would have been minimal, and the burden on the federal judicial system would have been correspondingly minor.[8] In particular, the burden on this Court, to which direct appeal is

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[8] Since the Attorney General's decision to preclear a submitted change is not reviewable, *see Morris v. Gressette,* 432 U.S. 432 U.S. 491 (1977), the vast bulk of submissions are never presented to any section 5 court, since they receive administrative preclearance.

authorized on both section 5 coverage and section 5 substance issues, was kept relatively light. If jurisdictions are given discretion whether to submit changes, however, many are likely to decide to forego the process. Indeed, under the district court's interpretation, it would constitute legal error for a jurisdiction that does not believe that discrimination is a "plausible consequence" of a change to submit the change, since the change is not covered. This increases the likelihood that section 5 enforcement actions will have to be brought, and that disappointed parties will seek plenary review in this Court. Given that there are upwards of 17,000 submitted changes each year, *see Clark*, 111 S. Ct. at 2104, even a one percent decrease on the proportion of changes submitted to the Attorney General poses the potential of confronting this Court with enough section 5 mandatory appeals to completely occupy the Court's entire argument calendar year in and year out. The time to make clear that entire categories of election law changes must be submitted for preclearance is now.

II. THE COURT BELOW COURT BELOW APPLIED THE WRONG BURDEN OF PROOF TO THE WRONG ISSUE

One thing has been clear about section 5 since its enactment: section 5's central goal was "to shift the advantage of time and inertia from the perpetrators of the evil [of discrimination in voting] to its victims." *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966). A key aspect of this shift lies in the location of the burden of proof. As this Court noted in *Georgia v. United States*, 411 U.S. at 538, n.9 (internal quotation marks omitted):

> The very effect of § 5 was to shift the burden of proof with respect to racial discrimination in voting. Rather than requiring affected parties to bring suit to challenge every

> changed voting practice, States subject to § 5 were required to obtain prior clearance before proposed changes could be put into effect. The burden of proof is on the areas seeking relief.

Thus, whenever a jurisdiction wishes to make a change, "*it* must first demonstrate to a federal instrumentality that the change will be nondiscriminatory." *United States v. Board of Commissioners*, 435 U.S. at 121 (emphasis added). As this Court explained in *McCain v. Lybrand*, 465 U.S. at 256:

> The fact that a covered jurisdiction adopted a new election practice after the effective date of the Voting Rights Act raises, in effect, a statutory inference that the practice may have been adopted for a discriminatory purpose or may have a discriminatory effect and places the burden on the jurisdiction to establish that the practice is not discriminatory.

Despite these repeated and unambiguous directives, the district court in this case placed the burden on the plaintiffs to show that the challenged changes were in fact discriminatory. *See, e.g.*, J.S. App. at A-19 to A-20 (discussing how, given the relative racial breakdowns of Birmingham residents in Jefferson and Shelby Counties, it did not see a potential racially discriminatory impact);[9] *id.* at A-21 (rejecting section 5 coverage for the referendum

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[9] In *City of Pleasant Grove v. United States*, 479 U.S. 462 (1987), this Court upheld the *denial* of preclearance -- which *a fortiori* represents a requirement that preclearance be sought -- of an annexation of essentially uninhabited territory by a virtually all-white Alabama municipality because the municipality had not met its burden of proving that the annexation was not undertaken for a discriminatory purpose. If annexation by an all-white jurisdiction requires preclearance as a change affecting voting, then clearly this case falls within the preclearance requirement.

requirement, despite its recognition that the Attorney General's regulations would require submission because "[t]he plaintiffs have produced no evidence" of discrimination); *id.* at A-22 (rejecting section 5 preclearance for the actual date selected, again despite this Court's clear holdings to the contrary in *Lucas* and *Hampton County* and the Attorney General's regulations because plaintiffs "presented no firm credible evidence" of the likelihood decreased black turnout)[10]; *id.* at A-23 (exempting the referendum date from preclearance in part because Birmingham's city council, which is majority black, and Birmingham's mayor, who also is black, approved the date).[11] The district court's repeated references to whether the plaintiffs had shown discrimination to be a "plausible consequence" of the challenged changes shows that it simply ignored the statutory inquiry: it both relieved the jurisdiction of the congressionally mandated burden of proof and decided the wrong issue.

III. THE COURT BELOW MISUNDERSTOOD ITS STATUTORILY LIMITED ROLE

But even if the district court *had* properly placed the burden of proving nondiscrimination on the defendants, it would have committed a critical legal error. That inquiry is reserved by law solely for the Attorney General and for the United States District Court for the District of Columbia. That the district court fundamentally

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[10] In *Hampton County*, the speculative possibility of such decreased turnout was enough, without any specific evidence, for this Court to require preclearance. *See* 470 U.S. at 178.

[11] In *Castaneda v. Partida*, 430 U.S. 482, 499 (1977), this Court cautioned against inferring a lack of discrimination simply from the fact that members of the protected class served on the official body that made the policy.

misunderstood its role is demonstrated by its response to appellant's motion for reconsideration:

> If the calling of any election, without regard to any "potential for discrimination," was subject to § 5 preclearance, there could never be any place for a three-judge court to exercise any judgment. The question for the court would always be only, "Is there an election and is there any change, no matter how insubstantial such change might be, from previous similar elections?"

J.S. App. at A-27. The limited role that the district court emphatically rejects is, however, *precisely* the role Congress gave it. Local district courts in section 5 coverage cases are expressly forbidden from exercising "judgment" as to whether a change is discriminatory, and as to whether a defense witness' statements regarding the purpose and effect of a change are "credible."[12] This Court and Congress have repeatedly made clear that the *sole* task of local district courts is to determine whether the challenged law is a "voting qualification, prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964

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[12] The repeated references to whether evidence was "credible," *see, e.g.*, J.S. App. at A-18, A-25, A-27, and A-28, and the reliance on testimony "disput[ing] the claim" of discriminatory impact, J.S. App. at A-22, shows how the court below reached out to decide an issue over which it had no jurisdiction: whether the changes here were actually discriminatory. Credibility determinations simply have no place in deciding the *only* questions properly before the court below: whether the challenged parts of the Dog Racing Act and City Council resolutions involved "qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting," 42 U.S.C. § 1973c, and, if they did, whether they involved changes in pre-existing rules. None of the analysis or testimony relied on by the district court disputed either of these propositions, and thus none of the analysis or testimony justified the result that court reached.

...." 42 U.S.C. § 1973c. If it is, the local district court's job is at an end: it *must* require preclearance.

The "potential for discrimination" language in this Court's opinions in *Hampton County*, *Dougherty County Board of Education*, *Perkins v. Matthews*, and *Allen* simply does not bear the tortuous construction forced upon it by the court below. In each of those cases -- which all involved this Court in deciding for the first time whether a particular change fell within the *category* of changes requiring preclearance -- this Court made clear that it was not deciding the ultimate question of discrimination, but simply requiring the covered jurisdiction to seek preclearance. And in each of those cases, this Court required submission for preclearance. The decision in this case, by contrast, uses the concept of "potential for discrimination" to pretermit submission altogether. That is a completely unprecedented, and unacceptable, reading of a statute whose language is clear.

CONCLUSION

For the reasons stated above, the Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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OPINION AND ORDER, AUG. 26, 1991

United States District Court
Northern District of Alabama
Southern Division

The Greene County Racing Commission *et al.*,	]	
Plaintiffs,	]	
vs.	]	CV-91-N-1930-S
The City of Birmingham, *et al.*,	]	
Defendants.	]	

BEFORE DUBINA, Circuit Judge and PROPST and NELSON, District Judges.

NELSON, District Judge:

I. STATEMENT OF THE CASE

The Voting Rights Act of 1965, 42 U.S.C. § 1973, *et seq.*, (the Voting Rights Act) prohibits any state or political subdivision of a state from imposing or applying any "qualification or prerequisite to voting or standard, practice, or procedure ... which results in a denial of abridgement of the right of any citizen ... to vote on

account of race or color." 42 U.S.C § 1973.[1] Section 5 of the Voting Rights Act provides that when certain states and political subdivisions designated by the United States Attorney General[2] "shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, or practice, or procedure with respect to voting different from that in force or effect on November 1, 1964 ... no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure" unless and until such state or political subdivision shall have sought and obtained a declaratory judgment in the United States District Court for the District of Columbia "that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c. Alternatively, the affected state or political subdivision may preclear any proposed change by submitting it to, and securing the approval of, the United States Attorney General. *Id.*

In this civil action the plaintiffs claim the defendants did not preclear certain alleged changes in voting procedures to be used in connection with a public referendum. They seek injunctive and declaratory relief to

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[1] The Voting Rights Act of 1965 was enacted to effectuate the provisions of the Fifteenth Amendment to the United States Constitution and to insure that no citizen's right to vote is denied or abridged on account of race or color. *NAACP v. New York*, 413 U.S. 345, 93 S.Ct. 2591, 37 L.Ed.2d 648 (1973).

[2] The entire State of Alabama has been designated by the Attorney General as subject to the provisions of the Voting Rights Act of 1965. 28 C.F.R. Part 51, Appendix.

prevent the defendants from conducting a referendum among the voters of Jefferson County, Alabama, on Tuesday, August 27, 1991, to determine whether greyhound racing and pari-mutuel wagering thereon will be legalized in that county.[3] The plaintiffs are: the Greene County Racing Commission, a public corporation formed for the purpose, *inter alia*, of regulating greyhound racing and pari-mutuel wagering in Greene County, Alabama; the Greene County Board of Education, a beneficiary of certain income from the proceeds derived from pari-mutuel wagering on greyhound racing in Greene County, Alabama; the Greene County Commission, the governing body of Greene County, Alabama; and Cynthia Harris, a registered voter in Birmingham, Jefferson County,

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[3] The complaint, filed on Thursday, August 15, 1991, contains, in addition to this claim under the Voting Rights Act, a number of claims under the constitution and laws of the State of Alabama and the federal constitution. Pursuant to the provisions of 42 U.S.C. § 1973c and 28 U.S.C. § 2284, Chief Judge Gerald B. Tjoflat designated Circuit Judge Joel F. Dubina and District Judge Robert B. Propst to serve with the undersigned as a three-judge court to hear and determine the claims under Section 1973c. The three-judge court conducted a final hearing on the merits of the Voting Rights Act claims on Thursday, August 22, 1991, and Judge Dubina, at the close of that hearing, announced that the court would deny the motion for interlocutory relief. This opinion and order will dispose of the claims under the Voting Rights Act on the merits.

State law claims and federal constitution claims are not before the three-judge court. By separate order, the district judge to whom this action was assigned has dismissed all state law claims under the provisions of 28 U.S.C. § 1367, as amended. The federal constitutional claims remain pending before the single-judge court.

Alabama.[4] The defendants are: the City of Birmingham, Alabama; the Jefferson County Commission, the governing body of Jefferson County, Alabama; the Birmingham Racing Commission, a public corporation organized and empowered to regulate thoroughbred horse racing and pari-mutuel wagering thereon in Birmingham, Alabama; Birmingham Sports Management and Milton McGregor, a corporation and one of this principal shareholders.[5]

The requested relief will be denied and the Voting Rights Act claims will be dismissed with prejudice.

II. THE FACTS

Except to the extent that it is authorized by specific statute, gambling, including pari-mutuel wagering on horse racing and greyhound racing, is prohibited in the State of Alabama as being in violation of the state's criminal code.

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[4] The original plaintiff was Randy Gann, a registered voter in Shelby County, Alabama. On the morning of the hearing the court permitted Mr. Gann to withdraw. Plaintiff Cynthia Harris was allowed to intervene.

[5] The Voting Rights Act limits State governments and their political subdivisions. Neither Birmingham Sports Management nor Milton McGregor is a state or political subdivision of a state. There is no claim that either is or has threatened to conduct any election or voting activity on behalf of a state or political subdivision. Neither is a proper defendant in an action brought to enforce provisions of the Voting Rights Act.

(*Ala. Code §§* 13A-12-20 to -31 (1975).[6] The Greene County Racing Commission and pari-mutuel wagering on greyhound racing were authorized by Act No. 75-376 on September 19, 1975 and a greyhound racing facility apparently has operated in Greene County for a number of years. In 1984 the Alabama legislature authorized the establishment of a racing commission in the City of Birmingham and also legalized horse racing and pari-mutuel wagering on such horse racing in that city. 1984 Ala. Acts 159 (codified at *Ala. Code* § 11-65-1 *et seq*) (Horse Racing Act) The Horse Racing Act provided that it would be effective only if horse racing and pari-mutuel wagering thereon were approved at an election conducted in the City of Birmingham and in the county or counties in which the City, "or any part thereof," was located. The act further required approval by both "a majority of all the voters casting votes in such referendum and ... a majority of the voters casting votes in such referendum who reside in the [City of Birmingham]" before it could become effective. *Ala. Code,* § 11-65-46. At an election conducted on June 12, 1984, majorities of the voters in Jefferson County and in Birmingham approved the establishment of

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[6] *Ala. Code* § 13A-12-31 provides:

> The provisions of this article [relating to the suppression of gambling places] shall not apply to pari-mutuel betting at race meetings authorized by statute. All presently effective state statutes and laws and locally adopted ordinances and laws pursuant thereto legalizing, authorizing or allowing greyhound races and betting and wagering thereon are hereby expressly and specifically preserved, saved and excepted from any repealer provisions contained anywhere in the Criminal Code.

the Birmingham Racing Commission and horse racing with pari-mutuel wagering. (Defendants' Exhibit 2) Under the provisions of the Horse Racing Act, the Birmingham Racing Commission issued a license for the ownership of a horse racing facility located in Birmingham, Alabama and an operator's license to conduct horse racing and pari-mutuel wagering thereon at such racing facility. The holders of those licenses and related interests constructed a horse racing facility and instituted a horse racing program including pari-mutuel wagering.

Horse racing in Birmingham proved to be an economic failure and the original holder of the licenses eventually sought the protection of the bankruptcy laws on the United States. Through an arrangement not entirely clear from the record, but seemingly with the approval of the bankruptcy court, a second horse racing operator was permitted to conduct horse racing and pari-mutuel betting operations at the racing facility. It, too, was an economic failure. According to legislative findings made in 1991, the original holder of the licenses and its successor incurred total losses of $22,500,000 from the time the track opened until horse racing ended there in 1990. Act of July 28, 1991, No. 187, § 1; Plaintiffs' Exhibit 4.

At the time Act No. 84-131 was enacted, the City of Birmingham was situated entirely in Jefferson County, Alabama, and the referendum on the approval of horse racing and pari-mutuel betting was limited to that county. The City has since extended its boundaries by annexation into neighboring Shelby County.

At his regular session in 1991, the legislature

enacted Act No. 91-187 (Dog Racing Act)[7] which substantially amended Act No. 84-131, *inter alia*, to authorize greyhound racing and pari-mutuel betting thereon in the City of Birmingham.[8] Issues have been raised under the Voting Rights Act with regard to a number of passages and provisions in Act No. 91-187. Section 4(b)[9] of the act, amending *Ala. Code* § 11-65-4,

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[7] Act No. 91-187 was allowed to become law on July 28, 1991 without the signature of the governor. (Plaintiffs' 4)

[8] Both of the relevant acts, Act No. 84-131 and Act No. 91-187, speak of authorizing racing and pari-mutuel betting in "Class 1 Municipalities." A Class 1 Municipality is defined as a city of 300,000 or more inhabitants according to the 1970 census. *Ala. Code* § 11-40-12. Birmingham was and is the only Class 1 Municipality in the State of Alabama. The legislature has chosen to describe the city to which Acts 84-131 and 91-187 are applicable in terms other than by name in order to comply with certain provisions of the Alabama constitution having to do with local versus general laws. The court is no so constrained and, accordingly, will refer to the applicable city by its name.

[9] Section 4 of the Dog Racing Act, *Ala. Code* § 11-65-4, as amended, makes provisions for the holding of elections at which the voters of a Class 1 Municipality and of the county in which the majority of the people of the city reside must approve before racing and pari-mutuel betting will become legal. Section 4 (a), clearly, applies only to Class 1 Municipalities in which no racing commission, horse or dog racing, or pari-mutuel wagering existed before the enactment of Act No. 91-187. On the other hand, Section 4 (b) was intended to apply in Class 1 Municipalities which had previously authorized either horse racing and pari-mutuel betting or greyhound racing and pari-mutuel betting. Birmingham and Jefferson County did, in fact, conduct a referendum in 1984 at which horse racing and pari-mutuel betting were approved. Therefore, only Section 4 (b) applies to Birmingham and Jefferson County. Section 4 (a) was

provides that where an election has previously been held "that authorized either horse racing and pari-mutuel wagering thereon or greyhound racing and pari-mutuel wagering thereon, but not both such racing activities," as it has in Birmingham, the City is "mandated" to call an election prior to January 1, 1992, "to determine whether greyhound racing and pari-mutuel wagering thereon shall be permitted in [Birmingham.]"[10] Section 4(b) further provides that no voters who live outside Jefferson County shall be permitted to vote in the referendum. No election called for the purpose of considering either horse racing or greyhound racing may be "held on the date [the City of Birmingham] holds an election for its mayor or for two or more members of its governing body." Act of July 28, 1991, No. 187, § 4(c); Plaintiffs' Exhibit 4.

The mayor of Birmingham recommended, and its council adopted, Resolution No. 1257-91 by which the Jefferson County Commission was requested to call an "election to be held throughout the county on August 27, 1991, for the purpose of determining whether or not greyhound racing and pari-mutuel wagering thereon shall be permitted in the part of the City located within the County." (Defendants' Exhibit 2) As requested, the Jefferson County Commission promptly set the elect for August 27, 1991. The question to be presented to the

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apparently included to maintain the legal fiction that there is some possibility of Class 1 Municipalities in Alabama other than the city of Birmingham. Of course, that possibility exists only in *Ala. Code* § 11-40-12 is amended to change the definition of a Class 1 Municipality.

[10] The Act provides that "the governing body of [the city of Birmingham] shall determine the date of such election." Act of July 28, 1991, No. 187 § 4(b).

voters is:

> Do you favor the authorization of greyhound racing and pari-mutuel wagering thereon in that part of the City of Birmingham located in Jefferson County, as provided in Chapter 65, Title 11, Code of Alabama 1975? (Plaintiffs' Exhibits 2 and 3)

The only other measures on the ballot in any part of the county concern the renewal of certain ad valorem taxes dedicated to public school use. There are no candidates for public office listed on any ballot in the county. The greyhound racing question is not on the ballot to be used in that part of Birmingham that is situated in Shelby County, Alabama. (Plaintiffs' Exhibit 1)

Approximately one week before the scheduled vote the relevant voter roles [*sic*] reflected the following with regard to total voters and the racial composition of the electorate:

	Total	White	%	Black	%
Jefferson County	344,468	234,264	67.9	102,282	32.1
Birmingham/Jefferson County	133,977	53,810	40	75,300	60
Shelby County	56,150	51,879	92.4	3,854	7.6
Birmingham/Shelby County	82	81	98.78	1	1.22

(Defendants' Exhibit 1; Joint Exhibit 2)

III. DISCUSSION OF THE ISSUES.

A. The Voting Rights Act

Section 5 of the Voting Rights Act requires a covered jurisdiction, before implementing a change in voting procedures, to preclear that change either judicially or administratively and no such change "will be effective ... until and unless cleared" by one of the two statutorily provided methods. *Conner v. Waller*, 421 U.S. 656, 95 S. Ct. 20003, 44 L.Ed.2d 486 (1975) (per curiam). *See also United States v. Board of Supervisors*, 429 U.S. 642, 645, 97 S.Ct. 833, 51 L.Ed.2d 106 (1977); *Hathorn v. Lovorn*, 457 U.S. 255, 269, 102 S.Ct. 2421, 72 L.Ed.2d 824, *reh'g denied*, 458 U.S. 1131, 103 S.Ct. 15, 73 L.Ed.2d 1401 (1982). The court's consideration of these claims is more sharply focuses by prior interpretations of the Act from the Supreme Court and other lower federal Courts. Congress intended that the Voting Rights Act be given "the broadest possible scope." *Allen v. State Board of Elections*, 393 U.S. 544, 567, 89 S.Ct. 817, 832, 22 L.Ed.2d 1 (1969). The Court in *Allen* concluded further "that Congress intended to reach any state enactment which altered the election law of a covered State in even a minor way." *Id.* at 566. The act "was aimed at the subtle, as well as the obvious ...." *Id.* at 565.

Whether a specific change made by a covered political jurisdiction constitutes a change in a "voting qualification or prerequisite to voting, or standard, or practice, or procedure with respect to voting" that is subject to the preclearance requirement of Section 5 turns

on whether such a change has the "potential for discrimination" against black persons. *NAACP v. Hampton County Election Comm'n,* 470 U.S. 166, 181, 105 S.Ct. 1128, 1137, 84 L.Ed.2d 124 (1985). The court is required to give considerable deference to interpretations of the Voting Rights Act by the Attorney General. *United States v. Board of Comm'rs,* 435 U.S. 110, 131 98 S.Ct. 965, 979, 55 L.Ed.2d 148 (1978); *Hardy v. Wallace,* 603 F. Supp. 174, 177 (N.D. Ala. 1985) (three-judge court) (Vance, J.).[11]

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[11] The Attorney General has determined that certain types of changes affect voting for purposes of the Voting Rights Act. Examples of such changes are:

> Changes affecting voting include, but are not limited to, the following examples:
>
> (a) Any change in qualifications or eligibility for voting.
>
> (b) Any change concerning registration, balloting, and the counting of votes and any change concerning publicity for or assistance in registration or voting.
>
> (c) Any change with respect to the use of a language other than English in any aspect of the electoral process.
>
> (d) Any change in the boundaries of voting precincts or in the location of polling places.
>
> (e) Any change in the constituency of an official or the boundaries of a voting unit (e.g., through redistricting, annexation, deannexation, incorporation, reapportionment, changing to at-large elections from district elections, or changing to district elections from at-large elections).

The function of this three-judge court is limited. We may not inquire into the discriminatory purpose or effect of the changes. *Perkins v. Matthews,* 400 U.S. 379, 91 S.Ct. 431, 27 L.Ed.2d 476, (1971).

> The only questions to be decided by ... the three judge court ... is whether or not the State or Mississippi or any of its political

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(f) Any change in the method of determining the outcome of an election (e.g., by requiring a majority vote for election or the use of a designated post or place system).

(g) Any change affecting the eligibility of persons to become or retain candidates, to obtain a position on the ballot in primary or general elections, or to become or remain holders of elective offices.

(h) Any change in the eligibility and qualification procedures for independent candidates.

(i) Any change in the term of an elective office or an elected official or in the offices that are elective (e.g., by shortening the term of an office, changing from election to appointment, or staggering the terms of offices).

(j) Any change affecting the necessity of or methods for offering issues and propositions for approval by referendum.

(k) Any change affecting the right or ability of persons to participate in political campaigns which is effected by a jurisdiction subject to the requirement of Section 5.

28 C.F.R. § 51.13.

> subdivisions have acted in such a way as to cause or constitute a voting qualification or prerequisite to voting or standard, practice or procedure with respect to voting within the meaning of Section 5 of the Voting Rights Act of 1965, which changed the situation that existed as of November 1, 1964, and whether or not prior to doing so the City had filed a request for declaratory judgment with the United States District Court for the District of Columbia or asked approval of the Attorney General of the United States ....

Perkins, 400 U.S. at 384. (quoting the unreported oral opinion of the district judge to whom the case was first assigned). While the court may not inquire into any discriminatory purpose or effect of challenged changes, it must examine the fact with a view toward deciding whether "discrimination is a 'plausible consequence' of the change." *Hawthorne v. Baker,* 750 F. Supp. 1090, 1095 (M.D. Ala. 1990) (three-judge court) (Thompson, J.) (quoting *Turner v. Webster,* 637 F. Supp. 1089, 1092 (Ala.) (three-judge court) (Vance, J.) *See NAACP v. Hampton County Election Comm'n,* 470 U.S. at 181; *McCain v. Lybrand,* 465 U.S. 236, 104 S.Ct. 1037, 79 L.Ed.2d 271 (1984); *Dougherty County, Georgia Bd. of Educ. v. White,* 439 U.S. 32, 99 S.Ct. 368, 58 L.Ed.2d 269 (1978); *Georgia v. United States,* 411 U.S. 526, 93 S.Ct. 1702, 36 L.Ed.2d 472 (1973); *Perkins v. Matthews,* 400 U.S. at 383-385; *Allen v. State Bd. of Elections,* 393 U.S. at 555.

B. The Claims.

The district judge to whom the action was initially assigned perceived two potential grounds for the plaintiffs' claim that the Dog Racing Act could not be implemented until it has been precleared under Section 5 of the Voting Rights Act: (1) the act excluded voters of that part of Birmingham situated in Shelby County and (2) it excluded all the voters of Shelby County from participation in the referendum to consider the question of dog racing in Birmingham. On Friday, August 16, 1991, the court entered an order scheduling the hearing on the motion for interlocutory relief and directing the plaintiffs to file a brief "setting forth each issue to be heard at the ... hearing." In their brief, the plaintiffs stated they would pursue three claims at the hearing. They were (1) by limiting voting to Birmingham residents who live in the Jefferson County portion of the City, Birmingham residents of the Shelby County portion of the City have been "de-annexed": (2) the holding of an election to consider dog racing and pari-mutuel betting it itself a change from practices and procedures as they existed on November 1, 1964; and (3) the scheduling of a special election is a change requiring preclearance. By the time of the hearing, one day after the brief was filed, the plaintiffs had expanded their allegations to include claims that: (4) the prohibition on conducting the referendum in conjunction with the election of the mayor or two city council members had the potential to adversely effect [*sic*] black voters; (5) the date was selected to coincide with the beginning of the school year and would impact on the ability of black voters to get to the polls; (6) failure to give legal notice to the voters of Shelby County concerning the proposed

enactment of the Dog Racing Act was a change from prior law; and (7) the question to be presented on August 27 is a change from the question presented in connection with the Horse Racing Bill because it does not include any question concerning the establishment of a racing commission.

C. Plaintiffs' Standing

At the beginning of the hearing, the plaintiffs conceded that none of the plaintiffs except Cynthia Harris have standing to bring these claims under Section 5 of the Voting Rights Act. Because the jurisdiction of federal courts is limited to actual "cases" and "controversies" this court can adjudicate only the "legal rights" of litigants. *Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration,* 113 U.S. 33, 5 S.Ct. 352, 28 L.Ed. 899 (1885). A plaintiff has no standing to bring an action unless he can "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472, 102 S.Ct. 752, 70 L.Ed.2d 700, 709 (1982) (quoting *Gladstone, Realtors v. Village of Bellwood,* 441 U.S. 91, 99, 99 S.Ct. 1601, 60 L.Ed.2d 66 (1979)). The plaintiff must also demonstrate that the injury "fairly can be traced to the challenged actions" and "is likely to be redressed by a favorable decision." *Valley Forge College,* 454 U.S. at 472 (quoting *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976)). The Supreme Court has said:

> The requirement that a party seeking review must allege facts showing that he is himself adversely affected ... does serve as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome.

Sierra Club v. Morton, 405 U.S. 727, 740, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972).

None of the plaintiffs associated with Greene County has alleged any actual or threatened injury fairly traceable to the challenged conduct of the defendants. Those plaintiffs have alleged nothing more than the potential for economic injury traceable only to the perceived competition to be created by the existence and operation of a greyhound racing facility in Birmingham, Alabama. That is not a denial or abridgement of the right to vote on account or race or color or otherwise. These plaintiffs having suffered no actual or threatened injury from the conduct of the defendants, the Voting Rights Act claims of the Greene County Racing Commission, the Greene County Board of Education, and the Greene County Commission will be dismissed with prejudice.

The remaining plaintiff is Cynthia Harris, a registered voter who lives in the Jefferson County portion of the City of Birmingham. As such resident there can be no serious question concerning Ms. Harris' standing to raise at least some of the Section 5 claims. For example, had Ms. Harris proved that the selection of August 27, 1991, had the potential for discrimination on the basis of race or color, she would clearly have a stake in the

outcome of this action and would be in a position to benefit from a favorable ruling of the court. Ms. Harris' standing to raise other claims is less clear. It is difficult to see how she has been adversely affected by the exclusion of Shelby County voters from the referendum. However, since Ms. Harris has standing as to some claims and the others are insubstantial, it is not necessary that the court determine the parameters of her standing with great precision. Accordingly, the court will consider each of the grounds alleged in support of the claim for injunctive and declaratory relief.

D. Discussion of the Claims.

The plaintiff Harris is entitled to relief only if "discrimination is a 'plausible consequence' of the change." *Hawthorne v. Baker,* 750 F. Supp. at 1095; *NAACP v. Hampton County Election Comm'n,* 470 U.S. at 181; *McCain v. Lybrand*, 465 U.S. 236 (1984); *Dougherty County, Georgia Bd. of Educ. v. White,* 439 U.S. 32 (1978); *Georgia v. United States,* 411 U.S. 526 (1973); *Perkins v. Matthews*, 400 U.S. at 383-385; *Allen v. State Bd. of Elections,* 393 U.S. at 555. This minimal requirement has been spoken of in terms of the "potential for discrimination." *NAACP v. Hampton County Election Comm'n,* 470 U.S. at 181. While the necessary showing is slight, it "cannot be treated as so minimal as to write this requirement completely out of existence." *Hawthorne v. Hurley,* 756 F. Supp. 527, 531 (M.D. Ala. 1990) (three-judge court) (Thompson, J.). In this case, the plaintiffs have failed to offer any credible evidence that any one of the challenged practices, qualification or prerequisites to voting has any potential

for discrimination on the basis of race or color.

The original claims made by these plaintiffs focused strongly on the exclusion of Shelby County voters from the election. Indeed, the only plaintiff at the time who possibly had standing, Randy Gann, was alleged to be a registered voter in Shelby County.[12] With regard to the claims that the exclusion of Shelby County voters, either those living inside or outside Birmingham, constitute changes requiring preclearance before they can be implemented, the court makes several observations. First, no voter in Shelby County was qualified or permitted to vote in the referendum conducted under the Horse Racing Act on June 12, 1984 and to permit them to vote now would likely be a change subject to scrutiny under the Voting Rights Act. Second, 92.4% of the voters of Shelby County are white and 7.6% are black. The Jefferson County voting population is 67.9% white and 32.1% black. These figures suggest that the exclusion of the Shelby County voting population could not possibly have any discriminatory purpose or effect with regard to black voters in Birmingham or Jefferson County. In the Shelby County portion of Birmingham, 98.78% of the voters are white and 1.22% are black. As with the general population of Shelby County, the exclusion of a voting population that is more than 98% white could not possibly discriminate against blacks in Birmingham and Jefferson County. The court notes that no potential voter from

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[12] The court notes that though one claim raised in the original complaint, and pressed at the hearing, was that the Shelby County portion of Birmingham was "de-annexed" for purposes of the Dog Racing Bill, Mr. Gann's name does not appear on the list of registered voters in that portion of Birmingham. (Defendants' Exhibit 1)

Shelby County has claimed that the conduct of this referendum has the potential to discriminate against him.

The plaintiffs, in related claims, assert that the setting of the referendum and the setting of a special election each require preclearance under Section 5. At 28 C.F.R. § 51.17, the Attorney General has determined that special elections are subject to preclearance "to the extent that the jurisdiction makes changes in the practices or procedures to be followed."[13] While the regulation might suggest on its face, that every special election requires preclearance, the cases have consistently held that the plaintiff must still make a minimal showing of a potential for discrimination. *See NAACP v. Hampton County Election Comm'n,* 470 U.S. at 181; *McCain v. Lybrand,* 465 U.S. 236 (1984); *Dougherty County, Georgia Bd. of Educ. v. White,* 439 U.S. 32 (1978); *Georgia v. United States,* 411 U.S. 526 (1973); *Perkins v. Matthews,* 400 U.S. at 383-385; *Allen v. State Bd. of Elections,* 393 U.S. at 555; *Hawthorne*

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[13] 28 C.F.R. § 51.17 provides in pertinent part:

> (a) The conduct of a special election (e.g., an election to fill a vacancy; an initiative, referendum, or recall election; or a bond issue election) is subject to the preclearance requirement to the extent that the jurisdiction makes changes in the practices or procedures to be followed.
>
> (b) Any discretionary setting of the date for a special election or scheduling of events leading up to or following a special election is subject to the preclearance requirement.

28 C.F.R. § 51.17.

v. Baker, 750 F. Supp. at 1095. The regulation requires preclearance only where changes have a potentially discriminatory purpose or effect. The plaintiffs have produced no evidence that the mere setting of the dog racing referendum has the potential of discrimination on the basis or race, color or otherwise.

Next, the plaintiffs assert that the date selected for the referendum and the restrictions on the date to be selected represented changes having the potential for discrimination and that preclearance is required. The date selected for an election can give rise to a preclearance requirement under Section 5. *NAACP v. Hampton County Election Comm'n,* 470 U.S. 166; *Lucas v. Townsend,* 486 U.S. 1301, 108 S.Ct. 1763, 100 L.Ed.2d 589 (1988) (opinion in chambers, Kennedy, J.); *Hawthorne v. Hurley,* 756 F. Supp. 527 (M.D. Ala. 1990), *vacated*, 111 S.Ct. 1408, 113 L.Ed.2d 440.[14] Both *NAACP v. Hampton County Election Commission* and *Lucas v. Townsend* involved actual changes in previously established elections dates and were predicated upon findings that the changes has the "potential for discrimination." In *Hawthorne v. Hurley,* the court considered an actual change in the date for a special meeting of the Alabama State Democratic Committee to select new black members but concluded that there was "no indication whatsoever that [blacks] will in any way be disadvantaged" by the change in the meeting date. *Hawthorne v. Hurley,* 756 F. Supp. at 531.

The plaintiffs claim, first, that by forbidding local

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[14] That *Hawthorne* was later dismissed as moot does not diminish its persuasive value. The court cites it merely to illustrate the manner in which similar claims have been treated.

officials from setting the referendum on the same date that Birmingham's mayor or at least two of its council members were being elected, the Dog Racing Act has the effect of discouraging voters from participating in the election. Only inferentially do they argue that this factor would have a greater impact on black voters than it would have on white voters. They presented no firm credible evidence to support the claim. On the contrary, the leading black political in the City of Birmingham, Mayor Richard Arrington, disputed the claim. The only evidence to support this argument came in the form of opinion that was not shown to be based upon sufficient experience or factual background. The best that can be said for this claim is that any election having no candidates for public office is likely to produce a lower voter turnout than will an election at which candidates for public office are running. There is no evidence to suggest that any particular racial group will be impacted to a greater or lesser degree than will another racial group.

Second, the plaintiffs claim that the close proximity of the dog racing referendum to the opening of the public schools will discourage blacks from voting. The only evidence presented in support of this argument came from the plaintiff, Cynthia Harris. She testified that on August 27 she would be engaged in enrolling two children in school. She conceded on cross-examination that she did not work and could vote after enrolling her children in school except that she had "other things scheduled." Clearly, these "other things" were personal to her and had nothing whatsoever to do with the Dog Racing Act. The court notes that schools will be opening for whites, blacks and all other racial groups at the same time. There is no evidence that the opening of schools will impact blacks to

a greater or lesser degree than whites.

On this point, it should be noted that Mayor Arrington recommended the date for the referendum and the date was selected by resolution of the Birmingham City Council which has a six to three black majority.

Finally, the plaintiffs claim that the lack of a question on the dog racing ballot concerning the establishment of a racing commission represents a change subject to preclearance. They have not presented any evidence from which the court could conclude that this change has any potential for discrimination on the basis or race or color.

IV. CONCLUSION

The court will enter final judgment dismissing the Voting Rights Act claims of all the Greene County plaintiffs for want of standing and dismissing the claim of plaintiff Cynthia Harris on the merits.

Done, this 26th of August, 1991.

/s/ Edwin L. Nelson

Edwin L. Nelson
United States District Judge

ORDER, SEPT. 19, 1991

United States District Court
Northern District of Alabama
Southern Division

The Greene County Racing Commission *et al.*,	]	
Plaintiffs,	]	
vs.	]	CV-91-N-1930-S
The City of Birmingham, *et al.*,	]	
Defendants.	]	

BEFORE DUBINA, Circuit Judge and PROPST and NELSON, District Judges.

NELSON, District Judge:

This matter comes before the court on the plaintiffs' motion for reconsideration of the opinion and order entered in this action on August 26, 1991. Plaintiffs assert that the court misconstrued the threshold burden properly allocated to the plaintiffs by requiring them to adduce evidence sufficient to demonstrate that changes in qualifications or prerequisites to voting in the Dog Racing Election of August 27, 1991, created a "potential for discrimination" with respect to the rights of persons to vote

on account of race or color. The court will give further consideration to the claim of the plaintiff, Cynthia Harris. It should be noted, however, that the *real* parties with interests in this action, the Greene County plaintiffs, clearly have no standing to raise claims under § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c.

The thrust of plaintiffs' motion is that this court erred, first, in requiring them to meet an initial burden of showing a "potential for discrimination" and, second, in concluding that they failed to produce credible evidence from which the court could have concluded that there was such a *potential* for discrimination in the election on the Dog Racing Act. In reaching its decision, this court relied upon the opinions of Judge Vance in two previous opinions of this court, *Turner v. Webster*, 637 F. Supp. 1089 (N.D. Ala 1986) (three-judge court) (Vance, J.), *Hardy v. Wallace,* 603 F. Supp. 174 (N.D. Ala. 1985) (three-judge court) (Vance, J.), and controlling decisional law from the Supreme Court.

The Supreme Court has, on more than one occasion, referred to the duty of the courts to determine whether there existed a "potential for discrimination." *See NAACP v. Hampton County Election Comm'n,* 470 U.S. 166, 181, 105 S.Ct. 1128, 1137, 84 L. Ed. 2d 124, 138 (1985); *Dougherty County Board of Educ. v. White,* 439 U.S. 32, 42, 99 S. Ct. 368, 374, 58 L. Ed. 2d 269, 280 (1978). In *Perkins v. Matthews,* 400 U.S. 379, 91 S. Ct. 431, 27 L. Ed. 2d (1971), relied upon by plaintiffs, the Supreme Court cited *Allen v. State Board of Elections,* 393 U.S. 544, 89 S. Ct. 817, 22 L. Ed. 2d 1 (1969), for the proposition that "we do not consider whether this change has a discriminatory purpose or effect." *Perkins,* 400 U.S. at 385 (quoting *Allen*

393 U.S. at 570). The Court then stated:

> This is not to say that district court limited to deciding a "coverage" question should close its eyes to the congressional purpose in enacting § 5 - to prevent the institution of changes which might have the purpose or effect of denying or abridging the right to vote on account of race or color, for Congress meant to reach "the subtle, as well as the obvious, state regulations. . ." which may have the effect. *Allen,* 393 U.S., at 565. "What is foreclosed to such district court is what Congress expressly reserved for consideration by the District Court For the District of Columbia or the Attorney General - the determination whether a covered change does or does not have the purpose or effect "of denying or abridging the right to vote on account of race or color."

Perkins v. Matthews, 400 U.S. at 385. The Court in *Perkins,* when referring to the "potential" for discrimination, stated, "§ 5 was designed to cover changes having a potential for racial discrimination in voting . . . ." *Id.* at 389. In *NAACP v. Hampton County Election Comm'n*, Justice White, writing for the court, stated, "our inquiry is limited to whether the challenged alteration has the potential for discrimination." *NAACP v. Hampton County*, 470 U.S. at 181 (emphasis in original). Similarly, in *Dougherty County Board of Ed. v. White*, Justice Marshall wrote, "Thus in determining if an enactment triggers § 5 scrutiny, the question is not whether the provision is in fact innocuous

and likely to be approved, but whether it has the potential for discrimination." *Dougherty,* 439 U.S. at 42 (emphasis in original).

Logic and common sense dictate that any plaintiff who brings a challenge under § 5 of the Voting Rights Act must first meet some minimal threshold to qualify for relief. If the calling of any election, without regard to any "potential for discrimination," was subject to § 5 preclearance, there could never be any place for a three-judge court to exercise any judgment. The question for the court would always be only, "Is there an election and is there any change, no matter how insubstantial such change might be, from previous similar elections?" The burden imposed upon the plaintiff is a minimal one, but it "cannot be treated as so minimal as to write this requirement completely out of existence." *Hawthorne v. Hurley*, 756 F. Supp 527, 531 (M.D. Ala. 1990) (three-judge court) (Thompson, J.), vacated, 111 S. Ct. 1408, 113 L. Ed. 2d 440 (1991).[1]

In the motion for reconsideration, the plaintiffs continue to conjecture that various aspects of the Dog Racing election *may* impinge on the right to vote on account of race or color. If the plaintiffs, however, are required to show a "potential for discrimination," as the court has decided they are required to do, it seems obvious that there must be some credible evidence of such potential, as opposed to mere speculation or unsupported

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[1] After the parties in *Hawthorne v. Hurley* reached an accord, the Supreme Court vacated the judgment and remanded with instructions to dismiss the case. The court cites the case primarily to illustrate the manner in which similar claims have been treated.

suspicion. As the court noted in its original opinion, the plaintiffs failed to offer any credible evidence that any one of the challenged practices, qualifications, or prerequisites to voting has any potential for discrimination on the basis of race or color. They still have not produced any credible evidence that would support a finding of potential discrimination.

Accordingly, for the foregoing reasons, it is the order, judgment and decree of the court that the plaintiffs' motion for reconsideration be and the same hereby is DENIED.

Done, this 19th of September, 1991.

/s/ Edwin L. Nelson

Edwin L. Nelson
United States District Judge

STATUTORY PROVISIONS INVOLVED

SECTION 5 OF THE VOTING RIGHTS ACT OF 1965, 42 U.S.C. § 1973c (1988):

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the

right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided,* That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 and any appeal shall lie to the Supreme Court.

CODE OF ALA. § 11-65-1(14) (MICHIE 1991 SUPP.):

It is further necessary and desirable (i) to permit the qualified voters of the host county of any Class 1 municipality and the qualified voters of such municipality who reside in the host county to determine by an election whether a commission shall be incorporated for such municipality and whether pari-mutuel wagering on horse racing or greyhound racing or both shall be authorized in such municipality, and (ii) in the case of any Class 1 municipality for which the incorporation of a commission and pari-mutuel wagering on either horse racing or greyhound racing, but not both, has been previously approved by an election of the qualified voters of such municipality and the host county, to permit such voters to determine whether the additional activity of pari-mutuel wagering on horse racing or greyhound racing, as the case may be, shall be authorized in that part of such municipality located in the host county.

CODE OF ALA. § 11-65-2(a)(18) (MICHIE 1991 SUPP.):

HOST COUNTY. Any county in which a sponsoring municipality is located. With respect to a sponsoring municipality located in more than one county, this term means the county in which a majority of the residents of the sponsoring municipality reside, as determined by the most recent federal decennial census.

CODE OF ALA. § 11-65-4(b), (c), and (d) (MICHIE 1991 SUPP.):

(b) In any case where an election has been previously held for a sponsoring municipality and the host county thereof in accordance with the then effective provisions of this chapter that authorized either horse racing and pari-mutuel wagering thereon or greyhound racing and pari-mutuel wagering thereon, but not both such racing activities, and a commission has been incorporated for such municipality and is in operation, the racing and wagering activity not authorized by such previous election shall not be permitted in such municipality pursuant to this chapter unless the same shall have been authorized by another election held in the host county in which such activity shall have been approved by both (i) a majority of the votes cast in such election by voters who reside in the host county (including those voters who reside in the sponsoring municipality) and (ii) a majority of the votes cast in such election by voters who reside in the commission municipal jurisdiction. In order to authorize the holding of the required election in the host county, the governing body of the sponsoring municipality may adopt an ordinance or resolution requesting the county commission of the host county to call an election to be held on the question of authorizing any racing and wagering activity covered by this chapter that has not theretofore been authorized by an election, and in such ordinance or resolution the governing body of the sponsoring municipality shall determine the date of such election, which shall not be less than 45 days nor more than 90 days after the date of the adoption of such ordinance or resolution, and shall further specify the racing

and wagering activity, whether horse racing and pari-mutuel wagering thereon or greyhound racing and pari-mutuel wagering thereon, that is to be authorized by such election; provided, however, that, anything contained in this chapter to the contrary notwithstanding, in the case of any Class 1 municipality for which horse racing and pari-mutuel wagering thereon has been authorized by an election held prior to April 16, 1991, the governing body of such municipality is hereby mandated to request the county commission of the host county call an election before January 1, 1992, in accordance with the provisions of this section 11-65-4 for purpose of determining whether greyhound racing and pari-mutuel wagering thereon shall be permitted in the commission municipal jurisdiction. Depending on which racing and wagering activity is to be authorized by the election, the question to be voted on shall be stated on the ballots or voting machine tags substantially as follows:

> "Do you favor the authorization of [insert here one of the following alternatives specified by the governing body of the sponsoring municipality in the ordinance or resolution calling the election]
>
> "horse racing and pari-mutuel wagering thereon"
>
> or
>
> "greyhound racing and pari-mutuel wagering thereon"
>
> in that part of the City of _____ [insert the name of the sponsoring municipality] located in _____ [insert the name of

the host county], as provided in Chapter 65, Title 11?"

Yes _____

No _____

The sponsoring municipality shall promptly furnish a certified copy of the ordinance or resolution calling such election to the county commission of the host county, whereupon such county commission shall be required to call an election in the host county to be held on the question and on the date specified in such ordinance or resolution. The election so called shall be held only among the qualified voters of the host county, and no voters of the sponsoring municipality who reside in counties other than the host county shall be permitted to vote in such election. If the majority of the votes cast in such election are "Yes", and if the majority of the votes cast in such election by voters who are residents of the commission municipal jurisdiction are "Yes", then the racing and wagering activity authorized by such election, in addition to the racing and wagering activity previously authorized to be conducted in the commission municipal jurisdiction, shall be legal in such jurisdiction, as and to the extent conducted in accordance with the provisions of this chapter, but such activity shall continue to be illegal in those parts of the sponsoring municipality outside such jurisdiction. If the majority of the votes cast in such election are "No," or if the majority of the votes cast in such election by voters who are residents of the commission municipal jurisdiction are "No", then the racing and wagering activity that was the subject of such election shall not be legal in the commission municipal jurisdiction,

unless the governing body of the sponsoring municipality should later call another election subject to the provisions of subsection (d); provided, however, that the disapproval by the voters in any election of any additional racing and wagering activity to be conducted in the commission municipal jurisdiction shall not revoke or impair any previous authorization for other racing and wagering activity, which authorization shall continue in full force and effect.

(c) The appropriate election officials of the sponsoring municipality and the host county are hereby directed to cooperate in calling and conducting any election held pursuant to the provisions of subsection (a) or (b) and in canvassing and declaring the results of such election. Any election called by the sponsoring municipality shall not be held on the date the sponsoring municipality holds an election for its mayor or for two or more members of its governing body. Any such election shall be called, advertised, conducted and the results thereof canvassed and declared in the manner provided by law for calling, advertising, conducting and canvassing other county elections on propositions submitted to the voters of the host county and as the governing body of the host county shall provide in the resolution calling such election; provided, however, that, notwithstanding any statute which requires, or might be interpreted to require, notice of such election in the sponsoring municipality to be published more than 30 days before such election, it is hereby expressly provided that the publication of notice of an election at least 30 days prior thereto prescribed by section 17-7-5 for county elections shall also apply to the publication of notice of such election in the sponsoring municipality. The election officials of the sponsoring

municipality and the host county are hereby directed to cooperate in preparing voter lists and establishing polling places that will enable the results of such election in the commission municipal jurisdiction to be separately determined from the results of such election in the host county as a whole. The costs of conducting any election pursuant to the provisions of subsection (a) or (b) shall be equitably apportioned between the sponsoring municipality and the host county according to agreement among the respective election officials of each such political subdivision or according to such other statutes as may at the time be applicable to the division of such election costs between the sponsoring municipality and the host county. In the event that the election officials of the sponsoring municipality and the host county cannot agree on a division of election costs and no other statute governs the division of such costs, such costs shall be divided equally among the sponsoring municipality and the host county. The results of any election conducted pursuant to this chapter shall be certified to the secretary of state, within 30 days after the election returns are canvassed, by the officer then authorized by law to certify proceedings taken by the election commission, board of canvassers or other body then required by law to canvass and declare the results of elections held in the host county.

(d) One or more subsequent elections may be requested by the governing body of a Class 1 municipality to be called by the county commission of the host county if the question submitted at the preceding election called pursuant to subsection (a) or (b) does not receive the required majority of the votes cast by voters of both the host county and the commission municipal jurisdiction; provided, however, that not more than one election in

each calendar year may be requested to be called pursuant to said subsection (a) or (b) by the governing body of any Class 1 municipality. Any such subsequent election shall be called, advertised, conducted and the results thereof canvassed and declared in the same manner and subject to the same conditions as the preceding election called pursuant to said subsection (a) or (b), as the case may be.

BIRMINGHAM CITY COUNCIL RESOLUTION 1257-1

BE IT RESOLVED by the Council (herein called the "Council") of the **CITY OF BIRMINGHAM, ALABAMA** (herein called the "City"), as follows:

Section 1. The Council has ascertained and does hereby declare as follows:

(a) Since the population of the City as certified by the 1970 federal decennial census was more than 300,000 inhabitants, the City is a Class 1 municipality under the provisions of § 11-40-12 of the Code of Alabama 1975.

(b) Act No. 84-131 of the 1984 Regular Session of the Legislature of Alabama (herein called the "Horse Racing Act") provided for the conduct of horse racing and pari-mutuel wagering thereon within any Class 1 municipality and for the creation within any such municipality of a racing commission to license, regulate and supervise such horse racing and pari-mutuel wagering.

(c) In a special election held throughout Jefferson County, Alabama (herein called the "County) on

June 12, 1984, both a majority of the voters residing within the City who participated in such election and a majority of the voters residing within the County who participated in such election voted in favor of the authorization of horse racing and pari-mutuel wagering thereon in the City and the creation of a racing commission for the City to license, regulate and supervise such horse racing and pari-mutuel wagering.

(d) As a consequence of the outcome of the aforesaid election held on June 12, 1984, The Birmingham Racing Commission (herein called the "Racing Commission") was incorporated to license, regulate and supervise horse racing and pari-mutuel wagering thereon within the City.

(e) Act No. 91-187 of the 1991 Regular Session of the Legislature of Alabama (herein called the "greyhound Racing Act") amended the Horse Racing Act in a number of respects for the purpose of providing for the conduct of greyhound racing and pari-mutuel wagering thereon within any Class I municipality.

(f) Certain provisions of the Greyhound Racing Act have the effect of limiting the geographic jurisdiction of the Racing Commission to the territory of the City that is located within the County (such territory being herein called the "Commission Municipal Jurisdiction") with the result that any racing or wagering activities authorized by said act must be conducted within such portion of the City.

(g) Under the Greyhound Racing Act, a condition precedent to the conduct of greyhound racing and pari-mutuel wagering thereon within the Commission

Municipal Jurisdiction is the approval of such racing and wagering in an election held throughout the County by both (i) a majority of the votes cast in such election by voters who reside in the County (including those voters who reside in the City) and (ii) a majority of voters cast in such election by voters who reside within the Commission Municipal Jurisdiction.

(h) Under the Greyhound Racing Act, the costs of conducting any special election to determine whether or not greyhound racing and pari-mutuel wagering thereon are to be authorized in the Commission Municipal Jurisdiction are to be equitably apportioned between the City and the County according to agreement among the respective election officials of the City and the County or according to such statutes as may at the time be applicable to the division of such election costs between the City and the County.

(i) It is appropriate and desirable for the Council to request the governing body of the County to call an election to be held throughout the County on the question of authorizing greyhound racing and pari-mutuel wagering thereon within the Commission Municipal Jurisdiction.

Section 2. The Council hereby requests the Jefferson County Commission to call an election to be held throughout the County on August 27, 1991, for the purpose of determining whether or not greyhound racing and pari-mutuel wagering thereon shall be permitted in the part of the City located within the County. The Council hereby requests that such election be held and conducted pursuant to, and in accordance with the provisions of the

Greyhound Racing Act. Without limiting the generality of the foregoing, the Council hereby requests that the Jefferson County Commission cause such election to be conducted in such a manner as will facilitate the separate canvassing of (i) the votes cast in such election by voters who reside in the County (including those voters who reside in the City) and (ii) the votes cast in such election by voters who reside in the Commission Municipal Jurisdiction.

Section 3. The various election officials of the City are hereby authorized and directed to cooperate with the election officials of the County in preparing for, conducting and canvassing the results of the special election requested in Section 2 hereof.

Section 4. The City Clerk is hereby directed to cause a certified copy of this resolution to be delivered as soon as practicable to the President of the Jefferson County Commission.

NOTICE OF APPEAL, OCT. 17, 1991

Notice of Appeal to the Supreme Court of the United States of America from the Judgment of a Three Judge Court

United States District Court for
the Northern District of Alabama

File Number CV 91-N-1930-S

THE GREENE COUNTY RACING COMMISSION, THE GREENE COUNTY BOARD OF EDUCATION, RANDY GANN, THE GREENE COUNTY COMMISSION, [Filed Oct. 17, 1991]

vs. Notice of Appeal

THE CITY OF BIRMINGHAM, THE JEFFERSON COUNTY COMMISSION, THE BIRMINGHAM RACING COMMISSION, BIRMINGHAM SPORTS MANAGEMENT, MILTON MCGREGOR,

Defendants.

NOTICE is hereby given that Cynthia Harris, a plaintiff in this cause, appeals to the Supreme Court of The United States of America from a final order entered in this action on the 19th of September, 1991, finding that

Plaintiff had failed to provide credible evidence that the challenged "alteration" had the potential to discriminate, and therefore, there had been no violation of Section 5 of the Voting Rights Act of 1965, Sections 42 U.S.C. and 1973 C.

Submitted by,

CHESTNUT, SANDERS, SANDERS, WILLIAMS & PETTWAY, P.C.

By /s/ J.L. Chestnut, Jr.

Attorney for Plaintiff
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